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| EXAMINER |
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SMITH, JEFFREY A

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| ART UNIT | PAPER NUMBER |
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3625

DATE MAILED: 04/06/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/653,555

Applicant(s)

MATTICK ET AL.

Examiner

Jeffrey A. Smith

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ML

— The MAILING DATE of this communication appears on the cover sheet with the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 November 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 2-5 and 7-14 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 2-5 and 7-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 26 June 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 26 November 2003 has been entered.

Drawings

The drawings were received on June 6, 2003. These drawings are approved.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the

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art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3-5, 7-10, and 12-14 are rejected under 35

U.S.C. 103(a) as being unpatentable over:

The American Council for an Energy-Efficient Economy
(ACEEE) as evidenced by:

a) "First-Ever Green Guide to Cars and Trucks Helps Buyers Choose Most Environmentally Friendly Vehicles That Meet Their Needs", PRNewswire, March 17, 1998 [Dialog File 813, Accession No. 1244108] (hereafter "First-Ever");

b) Nauman, Matt: "How Green is My...? Gas Hogs Get Their Comeuppance in a Book that Rates Cars, Trucks, Minivans and Sport-Utilities by Their Impact on Environment", San Jose Mercury News, Edition: Morning Final Section: Drive, page: 1G, April 3, 1998 [Dialog File 634, Accession No. 09593075] (hereafter "How Green"); and

c) www.aceee.org [archived at www.archive.org December 2, 1998] (hereafter "aceee.org"))

in view of Official Notice regarding the obtaining of data over the Internet and www.bbbonline.org.

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ACEEE, a non-profit concern independent of the automotive industry (see both "First-Ever" and "How Green"), established a web site (see both "First-Ever" and "How Green") which identifies and ranks cars and trucks for environmental performance. The company (which is considered an e-commerce company because of its web site presence) developed an objective environmental performance rating system based upon its own algorithm (see "How Green"'s discussion of the manner in which the scoring curve was established) driven by quality assured data provided by both the industry and the federal government (see "First-Ever"'s discussion of emissions certificates and fuel economy data which automakers report to the EPA). The data is processed into ratings in accordance with said algorithm to identify the most environmentally sensitive vehicles (see "How Green"'s discussion of emissions standards, health costs of emissions and global warming, lifetime pollution and greenhouse-gas emissions, and vehicle mass).

ACEEE's web site identifies the rating system and the identification of vehicles with the highest ratings (see "aceee.org").

ACEEE facilitates the promotion of the results by companies (see "How Green"'s discussion of automakers taking the

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information to heart and the hope that automakers will begin marketing certain vehicles as being picked a best bet).

ACEEE further identifies different vehicles by brand name and model (see "aceee.org"); produces the ratings in timed relationships with the beginning of the model year of the industry (see "How Green"'s discussion of ACEEE's intent to produce the ratings annually); and, by virtue of its web presence, has implemented its communication plans to identify the top environmental performers to consumers.

ACEEE establishes a national recognition for its ratings and its awards (it is noted that ACEEE is a national council). ACEEE facilitates the use of the rating system and use of the awards by the manufacturer in its promotional activity (see "How Green"'s discussion of its hope that automakers will take the information to heart and begin marketing certain vehicles as being picked a best bet).

ACEEE develops and implements its web site and press releases (see "aceee.org") which facilitates the recognition and acceptance for its rating system; and facilitates the advertisement and identification of top-rated vehicles to induce consumers to buy the top-rated vehicles (as discussed above).

The Examiner notes the many advantages either explicitly or implicitly present in ACEEE's method. For example, ACEEE rates

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vehicles in terms of how good or how bad they are for the environment (see "How Green"); enables consumers to select and buy the vehicles which most closely meet their concerns (see "First-Ever"'s discussion of "empower[ing] consumers to make greener choices"); influences consumer choice (see "First-Ever"); and encourages automakers to provide cleaner more fuel-efficient vehicles (see "First-Ever").

ACEEE does not detail the manner in which the quality assured data is obtained.

However, Official Notice is taken that it is notoriously well-know for publicly available data to be obtainable via the Internet. The data obtained by ACEEE concerns certain data reported to the EPA. It would have been obvious to one of ordinary skill in the art to have provided the method of ACEEE, as modified, to have included the step of obtaining the quality assured data already obtained from the EPA via the Internet in order to facilitate the data's procurement.

ACEEE does not detail a granting to each manufacturer of an award winning vehicle, the opportunity of a license to display said award in its advertising.

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www.bbbonline.org, in a similar method, teaches that "[t]he BBBOnLine seal allows online businesses to show their commitment to their customers". Such seal allows a user of the businesses' web site to confirm that any given business has met standards established by BBBOnLine. Such seal constitutes a "seal of approval" which amounts to a license to display such seal for the purposes intended.

It would have been obvious to one of ordinary skill in the art to have provided the combined method of ACEEE and Official Notice to have further included the step of granting to each manufacturer of an award winning vehicle, the opportunity of a license to display said award in its advertising in order that the manufacturers of award winning vehicles may show their commitment to their customers in offering "environmentally friendly" or "green" vehicles as determined by an independent source such as ACEEE.

Regarding claims 5 and 14, ACEEE, as modified, does not provide the step of establishing links between its web site and the web sites of automotive e-commerce business.

"BBBOnLine" teaches establishing links between www.bbbonline.org (which serves as a validating web service) and e-commerce businesses to permit visitors to the e-commerce web

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sites to obtain independent verification of ratings and awards (see "BBBOnLine": "BBBOnLine for Consumers: What to Look For").

It would have been obvious to one of ordinary skill in the art to have provided the method of ACEEE, as modified, to have included the step of establishing links to automotive e-commerce businesses (in the spirit of the teaching of "BBBOnLine") in order to allow e-commerce businesses, of the type addressed by ACEEE, the ability to show their commitment to the environment to their customers (see "BBBOnLine": "BBBOnLine for Consumers: What to Look For").

Claims 2 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over:

The American Council for an Energy-Efficient Economy (ACEEE) as evidenced by:

a) "First-Ever Green Guide to Cars and Trucks Helps Buyers Choose Most Environmentally Friendly Vehicles That Meet Their Needs", PRNewswire, March 17, 1998 [Dialog File 813, Accession No. 1244108] (hereafter "First-Ever");

b) Nauman, Matt: "How Green is My...? Gas Hogs Get Their Comeuppance in a Book that Rates Cars, Trucks, Minivans and Sport-Utilities by Their Impact on Environment", San Jose

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Mercury News, Edition: Morning Final Section: Drive, page: 1G, April 3, 1998 [Dialog File 634, Accession No. 09593075] (hereafter "How Green"); and

c) www.aceee.org [archived at www.archive.org December 2, 1998] (hereafter "aceee.org"))

in view of Official Notice regarding the obtaining of data over the Internet and www.bbbonline.org, as applied to claim 7, and further in view of "Fuel economy ratings: 1995 mileage estimates—Special report, part 4", Consumers' Research Magazine, Washington, Nov. 1994, Vol. 77, Iss. 11, page 18 (hereafter "Fuel economy").

Although "How Green" reports that ACEEE produces the ratings in timed relationships with the beginning of the model year of the industry (see "How Green"'s discussion of ACEEE's intent to produce the ratings annually), "How Green" does not specifically report that the ratings are produced at the beginning of the model year of the industry.

However, "Fuel economy" reports that similar rankings performed by the EPA (i.e. "the latest annual mileage estimates by the Environmental Protection Agency (EPA)") are made

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available to consumers in dealer show rooms and on new car stickers as required by law ("Fuel economy", last 3 lines). Accordingly, the EPA rating is produced at the beginning of the model year of the industry since no new car may be offered without said sticker containing it's respective EPA rating.

It would have been obvious to one of ordinary skill in the art to have provided the combined method to have included the step of producing the ratings at the beginning of the model year of the industry in order to have provided new car customers with important or pertinent rating information for consideration when choosing from among different car models (see "Fuel economy", first two lines).

Response to Arguments

Applicant's arguments received 26 November 2004 have been fully considered but they are not persuasive.

Applicant remarks that "[t]he Examiner's rejection uses no less than five references which are strung together in piecemeal fashion to meet the limitations of applicant's claims".

In response to applicant's argument that the examiner has combined an excessive number of references, reliance on a large number of references in a rejection does not, without more,

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weigh against the obviousness of the claimed invention. See *In re Gorman*, 933 F.2d 982, 18 USPQ2d 1885 (Fed. Cir. 1991).

Further Applicant in no manner has persuasively demonstrated that the rejections are provided in a "piece-meal" fashion. The Examiner has been careful to provide all obviousness rejections in a form consistent with the factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a). They are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Applicant remarks that "[t]here is no teaching in any of the references to combine the references as the Examiner has done, and the only teaching that does exist is found in applicant's own disclosure".

In response to applicant's argument that the Examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based

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upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). The Examiner has cited explicit teachings in the various references in order to advance a case of obviousness. Applicant's attention is directed to the bodies of the rejections which cite numerous passages in support of the Examiner's position.

Applicant remarks that "[a] rejection that is based on such a combination of unrelated prior art references is untenable and, should be withdrawn".

The Examiner notes that MPEP 2141.01(a) provides guidance in determining whether or not prior art references are analogous to the subject matter at issue. MPEP 2141.01(a) states as follows:

2141.01(a) Analogous and Nonanalogous Art TO RELY ON A REFERENCE UNDER 35 U.S.C. 103, IT MUST BE ANALOGOUS PRIOR ART

The examiner must determine what is "analogous prior art" for the purpose of analyzing the obviousness of the subject matter at issue. "In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of applicant's

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endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." *In re Oetiker*, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). See also *In re Deminski*, 796 F.2d 436, 230 USPQ 313 (Fed. Cir. 1986); *In re Clay*, 966 F.2d 656, 659, 23 USPQ2d 1058, 1060-61 (Fed. Cir. 1992) ("A reference is reasonably pertinent if, even though it may be in a different field from that of the inventor's endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem."); and *Wang Laboratories Inc. v. Toshiba Corp.*, 993 F.2d 858, 26 USPQ2d 1767 (Fed. Cir. 1993). (Emphasis added).

In the instant case, all of the references relied upon are within Applicant's field of endeavor and are reasonably pertinent to the particular problem with which the inventor was concerned. Applicant has made no persuasive demonstration otherwise.

Applicant's arguments regarding vehicle configurations (ACEEE) vs. brand/model designations (instant application) has been considered, but is not persuasive.

The Examiner notes that the ACEEE web site (see Ref. X, Paper 3) identifies that a user can "look under 'Compact Cars' to find the top-rated models". Of course, associated with the "model" designation is a brand.

Applicant appears to be arguing that the ACEEE method is more specific than that of Applicant—i.e. that the ACEEE

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analysis is done at a species level rather than at a genus level. Applicant believes that the consumer is confused by such specificity.

The Examiner does not agree. Data in the ACEEE system is presented in a manner similar to Applicant. In fact, the ACEEE web site (Ref. X, Paper 3) states that it provides "Green Scores" for all 1998 makes and models" and that "[o]ur 'Best of '98" tables list only the general vehicle make and model, not all of its configurations". Moreover, there is no reason to believe that confusion would result from the manner in which ACEEE presents its data vs. the manner in which Applicant presents their data—especially in view of the fact that ACEEE presents its data consistent with Applicant's claims.

Applicant remarks that the rating system of ACEEE is "confusing" and that Applicant's simplifications reduce the clutter and confusion of the prior art, and allow the consumer to interpret the ratings in a quick and easy way.

The Examiner does not agree. ACEEE use of symbols is not inherently confusing. ACEEE provides scores for all makes and models and further provides a "Best of '98" section featuring the "greenest models in each class". The user is afforded the opportunity to either specifically locate a vehicle of interest

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by brand and model designations and/or to consult what ACEEE considers to be the "Best" models in each class for that particular model year.

In response to Applicant's comment that the instant invention reduces the clutter and confusion of the prior art, such comment exalts form over substance. Applicant has not originally disclosed that such problem was present in the prior art and that the instant invention sought to solve such problem. Moreover, Applicant's claims do not move to distinguish the instant invention from ACEEE on this ground.

Applicant remarks that "there is no teaching or suggestion by either ACEEE or the other prior art references of obtaining data via the Internet in order to create market demand for vehicles at the brand/model level" (Applicant's emphasis).

It does not appear that Applicant is arguing that there is no teaching or suggestion by either ACEEE or the other prior art references of obtaining data via the Internet in order to create market demand for vehicles, per se. Rather, it appears that Applicant is merely arguing that such data is not at the brand/model level. The Examiner directs Applicant to the Examiner's previous responses regarding the "brand/model" issue.

In response to the implied argument that there is no teaching or suggestion by either ACEEE or the other prior art references of obtaining data via the Internet, the Examiner notes that Official Notice had been taken regarding this aspect of the claims (first taken at Paper 3, page 7). The Official Notice stated that it is notoriously well-known for publicly available data to be obtainable via the Internet and that the data obtained by ACEEE concerns certain data reported to the EPA. The Examiner stated in the Advisory Action (Paper 11) that "Applicant has failed to adequately traverse the Examiner's holding of Official Notice. Accordingly, the Noticed items are taken as admitted prior art. MPEP 2144.03(C)". Such admission constitutes a recognition of the Noticed items as prior art and therefore Applicant's remark that "[s]uch teaching is provided only in applicant's own disclosure" is not persuasive.

Applicant argues a hypothetical scenario in which a user of ACEEE, with a vehicle thus located, must turn to the EPA standards in order to determine the actual fuel economy of that vehicle.

The Examiner notes that Applicant is providing a scenario which was never relied upon to form the basis of the rejection. The purpose of the Examiner's comments in regard to "Fuel

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economy" (Ref. U, Paper 7) is to establish that the skilled artisan would have been motivated to have provided the ACEEE ratings at the beginning of the model year. ACEEE already produces the ratings in "timed relationships" with the beginning of the model year of the industry. The Examiner recognized, however, that such "timed relationships" does not necessarily mean "at the beginning of the model year" (as recited in claim 2, for example). Accordingly, "Fuel Economy" was provided to demonstrate why the skilled artisan would have provided the ACEEE ratings at the beginning of the model year. The rejection addresses the timing in the presentation of the data, not the organization of the presentation of the data.

Applicant remarks on "the 1998 Green Guide itself" and that the Examiner is ignoring what the Green Book publication actually comprises.

The Examiner notes that the "1998 Green Guide" itself is not of record. Applicant has cited "ACEEE's Green Book" (Copyright 2000). These are different publications. The Examiner has considered the "ACEEE's Green Book" cited by Applicant, however, it is noted that such book is not prior art, since the critical date of the instant application is September 1, 1999 (the filing date of provisional application 60/151,827).

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If Applicant believes that the "1998 Green Guide" itself is material to patentability and Applicant has access to the "1998 Green Guide" (as it appears from Applicant's discussion of such at page 16 of the Response filed 26 November 2003), then Applicant should cite such "1998 Green Guide" pursuant to 37 CFR 1.97 and 1.98.

In address of Applicant's remarks that the Examiner is ignoring what the Green Book publication actually comprises, the Examiner notes that the rejections, as formulated, do not rely upon the either the "1998 Green Guide" or the "ACEEE Green Book" (Copyright 2000) itself (see discussion of this at Paper 7, page 11). The Examiner is not ignoring the composition of the book. In the case of the "ACEEE Green Book" (Copyright 2000), the Examiner may not rely upon such book, since, as noted above, it is disqualified as prior art. In the case of the "1998 Green Guide", the Examiner notes that such publication is not of record, and accordingly the Examiner was not able to "ignore" it (as offered by Applicant) due to its very absence. Notwithstanding the ineligibility and absence of the respective ACEEE publications the Examiner has explained the role the "1998 Green Guide" would play in the over-all business model referred to as "ACEEE". Although such "Guide" may form part of the over-

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all business model exhibited by ACEEE, it does not form any part relied upon by the Examiner in making any of the rejections.

Applicant's remarks that "Bbbonline has nothing to do with the environmental ratings of vehicles" and that "bbbonline is not an award".

The Examiner has not relied upon bbbonline.org to teach the environmental rating of vehicles. ACEEE is sufficient in disclosing that aspect of the claims. bbbonline.org has been relied upon to show the conference of an award granted as merited or due. In the case of bbbonline.org, it allows conferees to display an awarded seal if it has met certain standards established by bbbonline.org. The fact that certain companies do not meet a requisite threshold is immaterial here. The fact remains that standards are in place and a company meeting the highest standards are granted an award in the form of at least a "seal of approval" for use in the conferee's advertisement. An online business, for example, is permitted to display the conferred seal "to show their commitment to their customers" (Ref. U, Paper 3). ACEEE already recognizes the "best" models in each class. bbbonline.org serves to teach that the "best" may have an award conferred upon them and be allowed

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or licensed to display such award for the purpose of displaying such award in their advertisement or promotional activities.

Applicant remarks that the instant invention creates market demand for vehicles at the brand/model level.

The Examiner maintains his position on the manner in which ACEEE discloses listing vehicles by brand/model. Accordingly, Applicant's further argument that "the step of indicating one or more vehicles at the brand/market level as an award winner in each class of vehicles [is an active step in defining a source for creating market demand] is not persuasive. In that ACEEE discloses listing vehicles by brand/model, it can also be said that ACEEE creates market demand for vehicles at the brand/model level.

Applicant remarks that claims 8 and 10 now recite "via the Internet without charge" and that "according to applicant's invention, consumers are given the environmental ratings free via the internet" (Applicant's emphasis).

The Examiner notes that such recitations are couched amid language which conveys the manner in which companies winning the awards and e-commerce product information/buying services are intended to disseminate information identifying vehicles which

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are the most environmentally sensitive. They are not viewed as being positive active method steps. Claim 8, for example, recites:

"said e-commerce company facilitating the promotion of the results of said environmental performance evaluation in accordance with said ratings by companies winning the awards and by e-commerce product information/buying services to communicate to consumers and other stakeholders, via the Internet without charge and via other media, identification of the vehicles which are the most environmentally sensitive".

This recitation identifies the e-commerce company positively and actively performing a step of facilitating the promotion of the results of the evaluation by companies winning the awards and by e-commerce product information/buying services. This recitation does not recite that the e-commerce company communicates to consumers via the Internet without charge. That action is intended to be performed by the companies winning the awards and by e-commerce product information/buying services, although it is not recited that such activity is actually performed. Nonetheless, there is no indication that the ACEEE web site (Ref. X, Paper 3) charges consumers for information provided therein. And, likewise, there is no indication that even bbbonline.org (which allows award winners to use its seal) charges consumers for viewing advertisement or promotional activity by companies winning and bearing such seal.


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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey A. Smith whose telephone number is 703-308-3588. The examiner can normally be reached on M-F 6:30am-6:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Wynn Coggins can be reached on 703-308-1344. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1113.



Jeffrey A. Smith
Primary Examiner
Art Unit 3625

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